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No. 82-167

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COMMANDER GEORGE C. CHAPPELL, *et al.*,
Petitioners,

v.

VERNON WALLACE, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

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BRIEF OF *AMICUS CURIAE* THE WASHINGTON LEGAL FOUNDATION

INTERESTS OF *AMICUS CURIAE* WASHINGTON LEGAL FOUNDATION

The Washington Legal Foundation (WLF or Foundation) is a national non-profit public interest law center that engages in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 85,000 members throughout the United States whose interests the Foundation represents.

WLF participates in and devotes a substantial portion of its resources to matters raising national security and defense issues as well as employment discrimination matters.

Briefs *amicus curiae* of the Foundation have been filed with and accepted by the United States Supreme Court in cases such as *United Steel Workers v. Weber*, 443 U.S. 193 (1979); *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256 (1979); and *General Building Contractors Assoc., Inc. v. Commonwealth of Pennsylvania*, 102 S.Ct. 3368 (1982). More significantly, WLF has litigated cases involving national security issues such as *Edwards v. Carter*, 580 F.2d 1055 (D.C. Cir. 1978), *cert. denied* 436 U.S. 907 (1978), and *Goldwater v. Carter*, 444 U.S. 996 (1979). The Foundation has also represented Senators and Congressmen before this Court in opposing the compulsory registration of women for the draft, *Rostker v. Goldberg*, 453 U.S. 57 (1980).

WLF believes that it can bring to this controversy a perspective not presently represented which will assist this Court in obtaining a full consideration of all relevant issue. The present parties to this suit are primarily concerned with its end results, *i.e.*, whether respondents may sue and recover $10 million in punitive and compensatory damages from petitioners for alleged constitutional violations. WLF, however, is concerned with the broader public interest issues, such as the effect such suits will have on discipline within the armed forces.

The Court of Appeals for the Ninth Circuit presently holds that servicemen may sue their superior officers in federal court for alleged constitutional violations incident to their military service. The Foundation believes that this decision is an unwarranted extension of *Bivens* which ignores past decisions of this Court dealing with military affairs and which will have an adverse impact on the ability of our armed forces to carry out their mission. For these reasons, WLF seeks to advance the interests of its members and the public at large by urging this Court to reverse the decision of the court below.

STATEMENT OF THE CASE

In the interests of judicial economy, *amicus* adopts the recitation of facts as presented by the Court of Appeals for the Ninth Circuit in *Wallace v. Chappell*, 661 F.2d 729, 730-31 (1981). However, in order for the constitutional issues presented by this case to be properly decided, *amicus* wishes to stress the following.

Respondents, 5 Black Americans, voluntarily enlisted in the United States Navy. While still on active duty, they brought the present race discrimination action against their superior officers. They claim, *inter alia*, that their personal dissatisfaction with duty assignments, work loads, discretionary promotions, and training opportunities on board the U.S.S. Decatur constitutes an alleged violation of their constitutional right to equal protection under the Fifth Amendment to the United States Constitution.

Respondents are seeking $10 million in compensatory and punitive damages against their superiors directly. The United States is *not* a party to the present action.

SUMMARY OF ARGUMENT

The Washington Legal Foundation submits that the Court of Appeals for the Ninth Circuit seriously erred in holding that servicemen now have the right, under *Bivens* and its progeny, to sue their superior officers directly for damages for alleged constitutional violations arising out of their military service. The Foundation further argues that if *Bivens* is applicable here, then absolute immunity rather than qualified immunity is appropriate.

The reasoning of the court below not only ignores past decisions of this Court dealing with military affairs but also fails to consider fully what the practical consequences of its novel decision will be. Permitting

a serviceman to sue his superior officers can only result in a gradual breakdown in military discipline and the progressive enfeeblement of our armed services and, hence, our national defense. Equally important, the Ninth Circuit's decision will have the undesirable effect of opening the courts of the United States to approximately 2 million enlisted servicemen and women to sue their superiors, at a time when the overloaded judicial system is already perceived by many as nearing the point of complete collapse. Finally, the lower court's decision constitutes yet another example of an unrestrained judicial invasion of the legislative sphere of authority despite the fact that Congress has provided ample administrative remedies in the chain of command for redress of servicemen's grievances.

For these reasons, *amicus* submits that the decision is contrary to law and not in the public interest, and should be summarily reversed.

ARGUMENT

I. *BIVENS* SHOULD NOT BE EXTENDED IN THE MILITARY CONTEXT.

In Bivens v. Six Unknown Fed. Narcotics Agents, 403 U.S. 338 (1971), this Court in an unprecedented decision held that victims of a constitutional violation by a federal agent have a right to recover damages against the official personally in federal court despite the absence of any statute conferring such a right.[1] This Court allowed, however, that the presumption of the existence of such a judicially-created, constitutional cause of action could be defeated in two ways. The first would be when defend-

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[1] *Amicus* believes that "*Bivens* is a decision 'by a closely divided court, unsupported by the confirmation of time', and, as a result of its weak precedential and doctrinal foundation," it should be either reversed or strictly limited to its facts. *See Carlson v. Green*, 446 U.S. 14, 32 (1979) (Rehnquist, J., dissenting), *quoting Kovacs v. Cooper*, 336 U.S. 77, 89 (1949).

ants were able to demonstrate "special factors counselling hesitation in the absence of affirmative action by Congress." *Id.* at 396. The second would be when defendants were able to show that Congress has provided an alternative remedy. *Id.* at 397.

A. "Special Factors" Exist In The Military Context Which Require That Constitutional Protections Be Applied Differently.

It is clear that, in the instant case, "special factors" are indeed raised by the fact that military officers are being sued by their subordinates for alleged constitutional violations arising out of disciplinary and personnel measures. Numerous cases have been decided by the Supreme Court which recognize the necessary differences between military and civilian life. *See, e.g., Greer v. Spock*, 424 U.S. 828 (1976); *Parker v. Levy*, 417 U.S. 733 (1974); *Secretary of the Navy v. Avrech*, 418 U.S. 676 (1974); *Toth v. Quarles*, 350 U.S. 11 (1955). While *amicus* recognizes that civilians are not stripped of all constitutional protections once they enter into the armed services, it is self-evident, and past case law stresses, that "the different character of the military community and of the military mission require a different application of these [constitutional] protections. The fundamental necessity for obedience, and the consequence necessity for the imposition of discipline may render impermissible within the military that which would be constitutionally impermissible outside of it." *Parker v. Levy, supra*, 417 U.S. at 758. *See also, Committee for GI Rights v. Callaway*, 518 F.2d 466, 474 (D.C. Cir. 1975) (denying claim that warrantless drug inspections by the U.S. Army in Europe were unreasonable and constitutionally impermissible under the Fourth Amendment).

The common sense expectation of differences in the nature of military and civilian life is such that in the past, this Court has not hesitated to deny judicial relief in the military context. Thus, in *Feres v. United States* 340

U.S. 135 (1950), a unanimous Court went so far as to reject the plain language of Federal Tort Claims Act in order to disallow suits by servicemen against the United States for service-related injuries. In rejecting claims under the FTCA, the Court was influenced by sound policy considerations, namely, the very real possibility that military discipline would become disrupted by these suits and that such a judicially sanctioned disruption in discipline could lead to the disintegration of our armed forces. As Chief Justice Warren later reflected:

> In the last analysis, *Feres* seems best explained by the 'peculiar and special relationship of the soldier to his superiors'; the effects of the maintenance of such suits on discipline, and the extreme results that might obtain if suits under the Tort Claims Act were allowed for negligent orders or negligent acts committed in the course of military duty.

United States v. Muniz, 374 U.S. 150, 162 (1963), *citing United States v. Brown*, 348 U.S. 110, 112 (1954). *See also Stencel Engineering Corp. v. United States*, 431 U.S. 666, 671-672 (1976).

Given this Court's justifiable fear of the "dire consequences" that would result if servicemen were allowed to sue on negligent claims arising out of "[a] battle commander's poor judgment, an army surgeon's slip of hand, or a defective jeep which causes injury," *Brooks v. United States*, 337 U.S. 47, 52 (1949), *a fortiori*, the Ninth Circuit should have exercised extreme caution in deciding whether or not servicemen may sue their superior officers, especially for conduct relating to the very essence of military functions, *i.e.*, duty assignment, discipline, and the like. Instead, the lower court relied on *Bivens* to find that respondents' claims were reviewable, and bootstrapped from this questionable premise to find that "the rationales favoring reviewability . . . likewise favor allowing recovery of money damages." *Wallace v. Chappell*, 661 F.2d 729, 735 (1981).

B. Alternative Congressional Remedies Exist Which Safeguard The Constitutional Rights Of Servicemen.

Even assuming, *arguendo*, that no such "special factors" exist, the fact that Congress has provided adequate remedies for redress of respondents' grievances should have been sufficient to prevent the Ninth Circuit from extending *Bivens*.[2] In the instant case, adequate alternative Congressional remedies exist which were specifically enacted in order to safeguard the constitutional rights of servicemen but, at the same time, would *not* disrupt military discipline or morale.

For example, 10 U.S.C. § 938 provides that:

> Any member of the armed forces who believes himself wronged by his commanding officer, and who, upon due application to that commanding officer, is refused redress, may complain to any superior commissioned officer, who shall forward the complaint to the officer exercising general court-martial jurisdiction over the officer against whom it is made. The officer exercising general court-martial jurisdiction shall examine into the complaint and take proper measures for redressing the wrong complained of; and he shall, as soon as possible, send to the Secretary concerned a true statement of that complaint, with the proceedings had thereon.

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[2] There is at present much dispute over whether the alternative remedy that Congress has provided and which defeats a *Bivens* action must be explicitly declared by the Congress to be a *substitute* for recovery under the Constitution or whether it is enough that the alternative remedy exists without any such explicit declaration on the part of Congress, *See Carlson v. Green*, 446 U.S. 14, 26-27 (Powell, J., concurring). In the opinion of *amicus*, if such actions are to be allowed they should be as strictly limited as possible. Accordingly, the Foundation adopts the position of Justice Powell that no explicit declaration on the part of Congress is necessary as long as an alternative remedy exists. Such a position is in line with "the Court's longstanding recognition that Congress is ultimately the appropriate body to create federal remedies." *Id.*

Thus, by statute, Congress has provided a mechanism for the redress of *any* serviceman's grievances and has done so, moreover, in a way which preserves the military chain of command.

In addition, 10 U.S.C. § 815(e) allows any servicemen who complains of discriminatory nonjudicial punishment because he "considers his punishment unjust or disproportionate to the offense may, through the proper channel, appeal to the next superior authority." Likewise with the enactment of 10 U.S.C. § 1552 Congress has provided a forum, *viz.*, Correction Boards, for servicemen to challenge allegedly discriminatory performance evaluations or promotion decisions. Under 10 U.S.C. § 1552 the Secretary of a military department and his Boards have also been vested with the authority to determine, insofar as is possible, the true nature of alleged injustices to any member of the military and to take steps to grant thorough and fitting relief. *See Duhon v. United States*, 461 F.2d 1278 (Ct. Cl. 1978); *Yee v. United States*, 512 F.2d 1383 (Ct. Cl. 1975).

II. ASSUMING, *ARGUENDO*, A *BIVENS* ACTION EXISTS, IT IS IMPERATIVE THAT MILITARY OFFICERS BE GRANTED ABSOLUTE IMMUNITY FROM SUIT.

After determining that a *Bivens* action existed against petitioners, the lower court held that whether or not petitioners could be found liable for monetary damages would depend upon four factors:

> (1) The nature and strength of the plaintiff's claim * * *. (2) The potential injury to the plaintiff if review is refused. (3) The extent of interference with military functions[,] * * * [although] interference per se should not preclude review because some degree of interference will always exist. (4) The extent to which military discretion or expertise is involved.

661 F.2d at 733.

These four factors, derived from *Mindes v. Seaman*, 453 F.2d 197, 201-202 (5th Cir. 1971), were thus used by the Ninth Circuit to fashion a "qualified immunity" for all military officers. As has already been pointed out by one member of this Court, however, this type of qualified immunity, which is dependent upon whether the military officer in question can prove that he acted in good faith, "badly misses the mark." *Economou v. Butz*, 438 U.S. 478, 520 (1978) (Rehnquist, J. dissenting.) Since the officer will not know until inquiry at trial whether or not immunity will be recognized by the court, granting him a qualified immunity will have the obvious effect of impairing his ability to make decisions, issue orders, or impose what he considers to be necessary disciplinary punishment. In short, qualified immunity "is no immunity at all." *Id.*

In curious fashion, the lower court does concede that certain situations may exist where granting military officers absolute immunity would be essential. "Possible exceptions, for example, might relate to military officials who perform functions analogous to those of judges . . . [or] *when decisions are made in a combat setting.*" *Wallace, supra*, 661 F.2d at 736 fn.10, (emphasis added). However, to suggest that a neat distinction can be drawn between decisions made by military officers in a combat setting and decisions made by these same officers in the time immediately prior to actual engagement in hostilities sadly misperceives the reality of military life and what is required merely in order to preserve military discipline, and hence, the potential maximum fighting capabilities of our armed forces. Moreover, it blithely assumes that judges are able to arrogate to themselves the legislative prerogative of declaring when "hostilities" begin anyplace in the world for the purpose of granting either absolute or only a qualified immunity. For example, suppose an enlisted man sued his superior officer for alleged constitutional violations based upon disciplinary sanctions he had received while serving as a

military advisor in El Salvador, or if he were a Marine sent to Lebanon. Are "hostilities" or "combat" under way in these situations entitling his commanding officer to absolute immunity, or does he receive only a qualified immunity because no war has been declared by Congress? Such inquiries are wholly inappropriate for the judiciary to undertake. *See Crockett v. Reagan*, No. 81-1034 (D.D.C., Oct. 4, 1982) (dismissal of suit alleging violations of War Powers Act because court incapable of fact finding to determine status of "hostilities"). *See also Atlee v. Laird*, 347 F. Supp. 689 (E.D. Pa. 1972) (three-judge court), *aff'd without opinion*, 411 U.S. 921 (1973); *Holtzman v. Schlesinger*, 484 F.2d 1307 (2d Cir. 1073), *cert. denied*, 416 U.S. 936 (1974).

The Ninth Circuit would also grant absolute immunity to military officers who perform functions analogous to judges. However, the very nature of war and its incident activity require that all military officers be granted this same absolute immunity. The fundamental necessity for obedience and for imposition of discipline dictate that a military officer's immunity from suit be as absolute as it is with the judiciary.[3] Any lesser standard will only lead to extensive litigation on the part of servicemen such as respondents and a concommitant decline in discipline and morale which will place in jeopardy the continued effectiveness of our nation's armed forces.

The Ninth Circuit acknowledges in its decision that such non-disruptive intraservice remedies exist, *Wallace*, *supra*, 661 F.2d at 738 fn.11, but betrays not even the

[3] The district court judge in this case, the Honorable Leland Neilson, was a former Navy Commander. In granting petitioners' motion to dismiss the complaint for, *inter alia*, military immunity he was properly guided by his own experiences as an officer in the Navy. *Amicus* submits that the reasons favoring absolute immunity for judges, namely insulation from the sort of pressures that might exist when it comes time to make hard decisions in the absence of absolute immunity, apply with equal force to military officers as well.

slightest indication that it understands their reason for being. Instead, it would extend the holding of *Bivens* in order to substitute the federal judicial appellate process for the military chain of command.

III. THE NINTH CIRCUIT'S DECISION IS AN UNWISE JUDICIAL INTRUSION INTO THE LEGISLATIVE SPHERE OF AUTHORITY.

Just as the Ninth Circuit recognized and then ignored the special nature of the military and the alternative remedies provided for by Congress, so too it paid lip service to Congress' role in overseeing the armed forces before it proceeded to aggrandize its own role.

The Ninth Circuit correctly noted the general objection that this Court has raised against judges "running the army," *Orloff v. Willoughby*, 345 U.S. 83, 93-94 (1953). In addition, it also took note of the indisputable fact that "under the Constitution, regulation of military affairs is within the special province of Congress rather than the courts. U.S. Const. art. I, § 8, cl. 14." *Wallace*, *supra* at 732. However, despite these prudential considerations, the lower court had little difficulty in holding that federal courts may now review the disciplinary decisions of military officers, and award money damages against them.

There are strong policy reasons which militate against having courts and juries second-guess the decisions of military officers. An officer's judgment to impose disciplinary sanctions on a serviceman is a prime example of the " 'complex, subtle, and professional decisions as to the composition, training, and control of a military force'." *Rostker v. Goldberg*, 453 U.S. 57, 65, *quoting Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Courts are ill-equipped to pass on such actions.

Additionally, "[a] plaintiff who seeks his remedy directly under the Constitution," as respondents have done here, "asks the federal courts to perform an essentially legislative task." *Carlson v. Green*, *supra*, 446 U.S. at 28. Given the primacy of Congress' role in the regulation of military affairs, the court's inability to handle the types of questions that would be raised in these suits, and the fact that the task is an essentially legislative one, the lower court should have affirmed the district court's opinion rather than extend *Bivens* beyond "the bounds of rational judicial decision-making." *Id.* at 29.

The decision below to allow servicemen to sue their superior officers is unwise in one final respect. At a time when the federal courts are already overburdened and when many individuals, including members of this Court, have spoken of the "breakdown" of the judicial system, it is incredible to say the least that the Ninth Circuit should have extended the principles of *Bivens* to the armed services. Such an unwarranted extension can only have the effect of dramatically increasing the number of frivolous or marginal constitutional suits that federal judges would be required to review.

CONCLUSION

The Washington Legal Foundation believes that the court below incorrectly held that servicemen may sue their superior officers under *Bivens*. To allow this decision to stand would be to sanction the disruption of our armed forces, the judicial usurpation of Congressional powers and an increasing work load being foisted upon our judicial system. For these reasons, the Court of Appeals for the Ninth Circuit should be reversed.

Respectfully submitted,

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